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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. JERRY MILES, Defendant and Appellant.	E052647 (Super.Ct.No. SWF022005) OPINION

APPEAL from the Superior Court of Riverside County. F. Paul Dickerson III, Judge. Modified and affirmed with directions.

Catherine White, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Julie L. Garland, Assistant Attorney General, Gil Gonzalez, and Vincent P. LaPietra, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant and appellant Jerry Miles was convicted of one count of rape of a child (Pen. Code, § 269, subd. (a)(1)) and three counts of simple battery (Pen. Code, § 242).[1] It was alleged that he had been convicted of nine previous strike felonies. On appeal, defendant raises several contentions with respect to sentencing, such as whether all but one of his strike priors should have been dismissed, the imposition of multiple enhancements for acts that were not brought and tried separately, and the imposition of enhancements under statutes that were not affirmatively pleaded. We agree with defendant that the imposition of sentence for any enhancement which was never pleaded is improper and must be stricken. We shall order the sentence modified accordingly, but otherwise affirm.

FACTS AND PROCEDURAL HISTORY

Defendant had sex with his 13-year-old great-niece (the victim) on several occasions in 2006. Defendant would take the victim places in his truck, and then perform sex acts on her or have her perform sex acts on him in the back seat of the truck. Defendant would buy her presents and give her money as an inducement not to tell anyone about their activities. In 2007, the victim discovered that she was pregnant. Her mother reported the matter to police. The victim later gave birth to a baby; DNA tests confirmed that defendant was the baby's father. The victim told her mother and told

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[1] All further statutory references will be to the Penal Code unless otherwise indicated.

police that defendant had forcibly raped her; at trial, she described one particular incident in which he held her down while she struggled. Defendant claimed that the victim had come on to him and initiated the contacts. He denied ever forcing himself on her.

Defendant was charged with two counts of aggravated sexual assault on a child under age 14, by a defendant 10 years or more older than the victim (§ 269, subd. (a)(1)), based on events alleged to have taken place on July 1, 2006. (At the close of the evidence, the prosecutor moved to modify the allegations as to counts 1 and 2, to reflect dates between May 16, 2005 and May 9, 2007.) Counts 3 and 4 charged two additional violations of section 269, subdivision (a)(1), alleged to have taken place between May 16, 2005 and May 9, 2007. The information further alleged one prison term prior conviction (§ 667.5, subd. (b)), and nine prior strike convictions (§§ 667, subds. (c), (e)(2)(A), 1170.2, subd. (c)(2)(A)).

Defendant pleaded not guilty and denied all the allegations.

A jury convicted defendant of aggravated sexual assault as charged in count 1, and three counts of lesser included offenses (simple battery) as to counts 2, 3 and 4. The prior conviction allegations were tried to the court. The court found the prior prison term allegation to be true, and found true eight of the nine prior strike offenses. It dismissed one prior strike.

Before sentencing, the probation department prepared a report which indicated that defendant's prior strike convictions could also have qualified as prior serious or violent felonies under sections 667, subdivision (a) (five-year enhancement for prior

serious felony brought and tried separately) and 667.6, subdivision (a) (prior violent sex offense five-year enhancement). Although these enhancements had not been alleged in the information or proved to the court, the probation department recommended adding these enhancements to defendant's sentence, because the validity of the prior convictions had been established by the true findings as strike priors.

The court sentenced defendant as follows: On count 1, the court imposed a term of 15 years to life, tripled under the three strikes law to 45 years to life. Over defendant's objection, the court also imposed 9 five-year enhancement terms, as recommended by the probation department: one for each of the eight strikes which could also constitute prior serious felony convictions (pursuant to § 667, subd. (a)) and one for the strike prior which could qualify as a prior violent sex offense (pursuant to § 667.6, subd. (a)). One additional year was imposed for defendant's prior prison term conviction. (§ 667.5, subd. (b).) Finally, the court imposed concurrent terms of 120 days each for the battery counts, counts 2, 3 and 4.

Defendant appeals, contending that the trial court erred in several respects, such as failing to dismiss all but one of his strike priors, and in imposing the five-year terms for the uncharged enhancements.

ANALYSIS

I.

THE COURT DID NOT ERR IN DECLINING TO DISMISS ALL BUT ONE OF THE STRIKE PRIORS

All of the nine alleged strike priors related to convictions of the same date, June 19, 1987. The abstract of judgment showed that the prison terms imposed for most of the strike priors were stayed pursuant to section 654. At the trial on the priors, the court found true eight of the nine strikes; the court did not find the seventh prior to be true, as the information alleged four robberies, three burglaries, one assault and one rape, while the prior packet showed that defendant had been convicted of three robberies, three burglaries, one assault, and two rapes. Thus, the court found one of the alleged robbery strikes not true.

Before the sentencing hearing, defense counsel requested the court to exercise its power under section 1385 to dismiss one or more of the strike priors in the interests of justice. (See *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497 (*Romero*).) The kernel of defendant's argument below was that, because all of the strike priors arose from one trial, and there was nothing in the record to show what dates the offenses were committed, the inference arose that all the priors stemmed from a single course of conduct. At least, counsel argued, there was nothing to show otherwise. In reliance on *People v. Burgos* (2004) 117 Cal.App.4th 1209 (*Burgos*), counsel further argued that, when prior offenses result from a single act, it is an abuse of discretion not to treat them

as a single strike for purposes of the three strikes law. Counsel therefore asked the court to exercise its discretion to dismiss all but one of the strike priors, and effectively to treat defendant as a second striker (subject to a 30-years-to-life sentence) rather than as a third striker (subject to a term of 45 years to life).

A trial court is vested with discretion to determine whether to dismiss one or more strike priors, pursuant to section 1385. That discretion is not unlimited, however; in *People v. Carmony* (2004) 33 Cal.4th 367, the California Supreme Court held that, "'[T]he Three Strikes initiative, as well as the legislative act embodying its terms, was intended to restrict courts' discretion in sentencing repeat offenders.' [Citation.] To achieve this end, 'the Three Strikes law does not offer a discretionary sentencing choice, as do other sentencing laws, but establishes a sentencing requirement to be applied in every case where the defendant has at least one qualifying strike, unless the sentencing court "conclud[es] that an exception to the scheme should be made because, for articulable reasons which can withstand scrutiny for abuse, this defendant should be treated as though he actually fell outside the Three Strikes scheme."' [Citation.]

"Consistent with the language of and the legislative intent behind the three strikes law, we have established stringent standards that sentencing courts must follow in order to find such an exception. '[I]n ruling whether to strike or vacate a prior serious and/or violent felony conviction allegation or finding under the Three Strikes law, on its own motion, "in furtherance of justice" pursuant to Penal Code section 1385[, subdivision] (a), or in reviewing such a ruling, the court in question must consider whether, in light of

the nature and circumstances of his present felonies and prior serious and/or violent felony convictions, and the particulars of his background, character, and prospects, the defendant may be deemed outside the scheme's spirit, in whole or in part, and hence should be treated as though he had not previously been convicted of one or more serious and/or violent felonies.' [Citation.] [¶] . . . [¶]

". . . For example, an abuse of discretion occurs where the trial court was not 'aware of its discretion' to dismiss [citation], or where the court considered impermissible factors in declining to dismiss [citation]. Moreover, 'the sentencing norms [established by the Three Strikes law may, as a matter of law,] produce[ ] an "arbitrary, capricious or patently absurd" result' under the specific facts of a particular case. [Citation.]" (*People v. Carmony*, *supra*, 33 Cal.4th 367, 377-378.)

We now review the issue and conclude that the trial court did not abuse its discretion in declining to dismiss all but one of defendant's strike priors.

Defendant's reliance on *Burgos*, *supra*, is misplaced. It does not stand for a blanket proposition that, when more than one strike arises from the same act, it is an abuse of discretion to fail to dismiss the excess strikes. In *Burgos*, the defendant's two prior strikes were literally based on the same single act: one instance of forcibly trying to steal a car which resulted in convictions of both attempted robbery and attempted carjacking. That case also involved the peculiarity of a particular statute, section 215, subdivision (c), which permitted charging both robbery and carjacking under similar circumstances, but expressly mandated that "no defendant may be punished under this

section and Section 211 for the same act which constitutes a violation of both this section and Section 211." Thus, the defendant could not be punished for both the attempted robbery and the attempted carjacking. The *Burgos* court imported the notion that the defendant could not be punished for both crimes into its three-strikes analysis, to determine that the defendant there could not be punished with two strikes for the convictions arising from one single act. (*Burgos*, *supra*, 117 Cal.App.4th 1209, 1216.)

In *People v. Scott* (2009) 179 Cal.App.4th 920 (*Scott*), the court analyzed *Burgos* and declined to extend it beyond its peculiar facts. The court held that *Burgos* does not *require* the court to dismiss all but one strike, even if the strikes are based on the same act. The holding in *Burgos* itself was rather confusing. That is, at first, "*Burgos* seems to hold that the 'same act' circumstance is dispositive, then seems to treat it as one factor in a *Romero* analysis, and then says the nature of 'the particular offenses that constituted the two prior strike convictions in this case' is what *compels* striking one strike, again strongly indicating a rule that the 'same act' circumstances mandate striking a strike in such cases. (*Burgos*, *supra*, 117 Cal.App.4th at pp. 1216-1217.) [¶] This leaves the actual holding of *Burgos* doubtful, and has led to a divergence of views." (*Scott*, *supra*, 179 Cal.App.4th 920, 930.) The question is whether *Burgos* makes a definitive rule, or identifies an additional factor (how closely related the strike crimes are) which must be weighed in a *Romero* analysis.

Scott involved the same underlying strike crimes as in *Burgos*, i.e., robbery and carjacking, which appeared to have arisen from a single act. The court nevertheless

concluded that, "[w]hichever rule *Burgos* meant to announce, . . . the 'same act' circumstances posed by robbery and carjacking cases provide a factor for a trial court to consider, but do not *mandate* striking a strike." (*Scott, supra*, 179 Cal.App.4th 920, 931.) The *Scott* court pointed out that the very definition of a "strike" in the three strikes law "is not affected by the sentence imposed unless the sentence automatically, upon the initial sentencing, converts the felony to a misdemeanor." (§ 1170.12, subd. (b)(1).) The three strikes law further expressly provides that "None of the following dispositions shall affect the determination that a prior conviction is a prior felony for purposes of this section: [¶] (A) The suspension of imposition of judgment or sentence. [¶] (B) The stay of execution of sentence. [¶] (C) The commitment . . . as a mentally disordered sex offender following a conviction of a felony. [¶] (D) The commitment to the California Rehabilitation Center . . . ." (*Ibid*.) Thus, the staying of a sentence under section 654, for example, affects the sentence at the time of the initial crime, but it does not affect the status of that offense as a separate strike, if and when the defendant reoffends.

In *People v. Benson* (1998) 18 Cal.4th 24 (*Benson*), the California Supreme Court made clear that treating prior convictions as strikes, even those prior convictions which were stayed in the earlier proceedings, does not violate prohibitions against multiple punishment for a single course of conduct (see, e.g., § 654). A strike is to be imposed "[n]otwithstanding any other provision of law . . . ." (§ 1170.12, subd. (b)(1); see *Benson, supra*, 18 Cal.4th 24, 31.) The defendant receives the benefit of the stay under section 654 when sentenced on the original felonies; "*it was only when defendant*

reoffended after the enactment of the Three Strikes law that he faced the prolonged incarceration of which he now complains. The Three Strikes law provided him with notice that he would be treated as a recidivist if he reoffended. [Citation.] He chose to ignore that notice and commit a subsequent felony." (*Benson*, *supra*, 18 Cal.4th 24, 35.) The *Benson* court noted the issue, which it did not resolve, whether there could be "some circumstances in which two prior felony convictions are so closely connected—for example, when multiple convictions arise out of a single act by the defendant as distinguished from multiple acts committed in an indivisible course of conduct—that a trial court would abuse its discretion under section 1385 if it failed to strike one of the priors."[2] (*Benson*, at p. 36, fn. 8.)

The *Scott* court, analyzing the Supreme Court's opinion in *Benson*, applied it in circumstances like those in *Burgos* to conclude that *Burgos* did not fashion a definitive rule, but rather identified a circumstance—the closeness of the connection between the strike conviction offenses—to consider when deciding whether to dismiss a strike prior.

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[2] Defendant's brief quotes this portion of *Benson*, but elides the court's distinction between multiple convictions arising from a single act, on the one hand, and multiple convictions arising from a single course of conduct, on the other. Defendant recognizes that he received a four-year sentence on one of his robbery convictions, and a full consecutive term of six years on the rape, which forecloses the possibility that his prior strike convictions were all based upon a single act. He proceeds to treat *Burgos* as if it mandates the dismissal of all but one strike prior when multiple convictions arise from a single course of conduct, as well as when they arise from a single act. It does not (*Burgos*, *supra*, 117 Cal.App.4th 1209, 1215-1216), as is made plain by the language defendant omitted from his *Benson* quotation.

(*Scott, supra*, 179 Cal.App.4th 920, 931.) Both *Scott* and *Burgos* involved prior strikes which were so closely related that they actually did arise from the same criminal act. Both also involved the special provision of section 215 prohibiting punishment for both carjacking and robbery. Nevertheless, the *Scott* court concluded that, even under such circumstances, the sentencing court in later proceedings was not required to treat carjacking and robbery convictions, arising from a single act, as only one strike. As in *Benson*, treating both convictions as separate strikes in a later proceeding did not violate the original prohibition against double punishment for carjacking and robbery. The *Scott* court echoed *Benson* when it found that "defendant received the benefit of the sentencing limitation of section 215 when he was sentenced in 1998. (See *Benson*, *supra*, 18 Cal.4th at p. 35.) He is not being improperly 'doubly punished' for robbery and carjacking, as he contends. He chose to reoffend, knowing that he had two prior strike convictions. He is not entitled to a vestigial benefit in *this case* from the section 215 sentencing limitation. All he was entitled to was consideration by the trial court of the closeness of the two strikes in determining whether, *in the exercise of discretion*, one should be stricken. The trial court considered that factor, but, in the exercise of its discretion, did not find that his violent record justified treating those two strikes—albeit arising from the same act—as one." (*Scott*, at p. 931.)

The *Scott* court also distinguished its result from *Burgos*, based on the other factors in a *Romero* analysis. That is, in *Burgos*, the defendant's prior record consisted of misdemeanor offenses. (*Burgos*, *supra*, 117 Cal.App.4th 1209, 1216.) In *Scott*, the

defendant's prior record was much more serious, including many instances of violence. The trial court in *Scott* therefore properly refused to find that the defendant fell outside the spirit of the three strikes law. (*Scott, supra*, 179 Cal.App.4th 920, 924, 926.)

We have concluded that *Burgos* does not mandate dismissal of strike priors which result from a single act. Even if it did, however, defendant could not show that he would come within that rule. Defendant's situation here is not analogous to that of the defendant in *Burgos*, or even in *Scott*. The defendants in each of those cases had multiple convictions arising from the same act. Although defendant here speculates—merely from the identical date of conviction of all his strike priors—that all of his priors resulted from a single act or single course of conduct, the nature of the offenses in themselves militates against his claim. He had strikes for different classes of offenses, including robbery, burglary, assault, and rape. He had multiple convictions as to some of the types of crimes, i.e., more than one robbery and more than one rape.[3] All the robbery convictions, for example, had to involve at least different persons, if not different incidents. It is also difficult to conceive of a single act that would result in convictions for, e.g., both rape and robbery. Even if *Burgos* purported to announce some kind of rule for treating multiple convictions as a single strike when they arise from only one act, the crimes of which defendant was convicted do not fall within that rubric. His strike priors

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[3] As noted, however, only one of defendant's prior rape convictions was alleged as a strike. The other was mistakenly identified as a robbery, and thus found not true by the trial court.

necessarily involved multiple criminal acts. The Supreme Court's footnote in *Benson* posited that "multiple convictions aris[ing] out of a single act by the defendant," might merit treatment as a single strike, but specifically "distinguished [the 'single act' situation] from multiple acts committed in an indivisible course of conduct" (*Benson, supra,* 18 Cal.4th 24, 36, fn. 8), strongly implying that multiple convictions arising from a single course of conduct would generally properly be treated as multiple strikes. Here, of course, defendant's strike convictions are of the latter kind.

Moreover, the entire point of defendant's *Romero* request was to gain treatment as a second-strike offender, and not as a third striker. Unless the court dismissed seven strikes, leaving only a single strike remaining, defendant could not hope to be treated as a second striker. Given the number of crimes he committed, their seriousness, the manifest difference in character of the crimes (i.e., they could not all have been the result of only one act), and all the other factors applicable to a *Romero* analysis, the trial court did not abuse its discretion in determining that defendant did not fall outside the spirit of the three strikes law.[4] The trial court properly exercised its discretion in refusing to dismiss defendant's strike priors.

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[4] Defendant below urged that the factors of a *Romero* analysis militated in favor of more lenient, i.e., second strike, treatment:

As to defendant's background, character, and prospects, counsel noted that defendant had only a 10th grade education and had worked in construction. He was 50 years old.

[footnote continued on next page]

2.

THE FIVE-YEAR TERMS FOR THE UNCHARGED ENHANCEMENTS MUST BE STRICKEN

Defendant next contends that the trial court's addition of 8 five-year terms under section 667, subdivision (a), and 1 five-year term under section 667.6, subdivision (a), were improperly imposed, because enhancements under those provisions were never

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As to the remoteness of the strike priors, defendant had been convicted in 1987, 23 years earlier. The convictions predated the three strikes law, i.e., they were not strikes at the time of adjudication.

As to defendant's past criminal conduct, counsel argued, relying on *Burgos*, that it would be an abuse of discretion not to treat closely-connected prior felonies as a single strike. "[T]he prior convictions were all sustained on June 19, 1987. There is no reference to the dates of the offence [*sic*] and no information that the priors did not arise from the same course of conduct. It appears to be one single course of conduct that are [*sic*] so closely connected factually that imposition of two strikes would be an abuse of discretion."

As to consideration of the sentence in the absence of the dismissed strikes, defense counsel argued that defendant would be subject to a second-strike sentence of 30 years to life; at defendant's present age of 50, the second-strike sentence would achieve the objectives of the recidivist sentencing scheme by isolating defendant from society until he was in his 70's.

As we have explained, above, defendant's *Burgos* contention is without merit. Defendant's strike priors consist of multiple offenses that had entirely different objectives, and constitute different types of offenses. The record of the priors supports the conclusion that at least two of the priors were the result of wholly different acts, and thus fully justifying treatment as a third striker.

The other factors do not establish that defendant is outside the spirit of the three strikes law. His strike prior convictions may have been 23 years old, but they were both numerous and serious. The only reason that the court did not find nine strikes against defendant, rather than only eight, was that the prosecutor mistakenly charged one of the 1987 rape convictions as a robbery. Thus, defendant had an additional conviction that could have qualified as a strike, which was not considered (as a strike) by the court. Defendant displayed little remorse for or understanding of the gravity of his conduct against his great-niece; indeed, he blamed the victim in his police interview.

charged in the information, and never proven to the court. Rather, the probation department, in the probation report, indicated that the same prior convictions which had been alleged as strike priors, could have been alleged again as enhancement priors. The probation department, although acknowledging that the enhancement priors had not been alleged in the information, nevertheless recommended imposing a consecutive term of 40 years for eight prior serious felony convictions (§ 667, subd. (a)) and an additional consecutive five-year term for the rape strike as a prior serious sex offense (§ 667.6, subd. (a)).

Defense counsel objected to the imposition of any term for uncharged priors. Defendant was entitled to have any such priors charged and proven to the same jury as determined his guilt of the offense. In *People v. Tindall* (2000) 24 Cal.4th 767, the California Supreme Court had held: "Section 1025, subdivision (b) provides, in pertinent part: 'the question of whether or not the defendant has suffered the prior conviction shall be tried by the jury that tries the issue upon the plea of not guilty . . . .' [Fn. omitted.] Section 969a, however, states that prior conviction allegations may be added '[w]henever it shall be discovered that a pending indictment or information does not charge all prior felonies . . . .' We interpreted section 969a to permit the prosecution, on order of the court, to amend the information until sentencing so long as the court has not discharged the jury. [Citation.] Notwithstanding section 969a, defendant argues that section 1025, subdivision (b), prohibits the prosecution from amending the information to allege prior

convictions after the jury that decided the guilt issue has been discharged. For reasons that follow, we agree." (*Id*. at pp. 771-772.)

Thus, although defendant waived the right to a jury trial on the strike priors, he was never advised of, and never waived, his right to a jury trial on the uncharged enhancement priors. Defendant urges that imposing an additional 45-year consecutive term, based on nine enhancements that were never pleaded, violated his federal and state constitutional rights, as well as state statutes (e.g., § 1025, subd. (b)).

The People contend that the imposition of prior serious felony enhancements under section 667, subdivision (a)(1) is mandatory, and that the accusatory pleading was not required to state the number of the statutory provision under which the enhancement was imposed, as long as the pleading set forth the factual basis of that provision.

The People state that, "[o]nce the court found that appellant had been convicted of a strike prior, it was required to impose a five-year enhancement," citing *People v. Purata* (1996) 42 Cal.App.4th 489, 498. *Purata* is inapplicable, however. In that case, the trial court had found true allegations that the defendant's out-of-state prior conviction was a serious felony prior, and a strike prior. (*Id*. at p. 492.) At sentencing, the trial court had refused to impose the serious felony prior (§ 667, subd. (a)(1)) because it had used the same offense as a strike prior; the court agreed with the defendant that sentencing on the same offense both as a strike and as a serious felony prior would constitute improper dual use of that conviction. (*People v. Purata, supra*, 42 Cal.App.4th 489, 494.) The reviewing court rejected the "dual use" argument, however, noting that,

"[w]here a person has been convicted of a serious felony in the current case, and it has been alleged and proved the person suffered a prior serious felony conviction within the meaning of section 667, subdivision (a)(1), the trial court must impose a consecutive five-year term for each such prior conviction. The trial court has no discretion and the sentence is mandatory. (*People v. Valencia* (1989) 207 Cal.App.3d 1042, 1045.) Thus, absent some other provision of law, the trial court lacked the authority to decline to impose the required punishment." (*Id*. at p. 498.) The key language, however, is that, "it has been alleged and proved the person suffered a prior serious felony conviction within the meaning of section 667, subdivision (a)(1) . . . ." In *Purata,* both the strike and the five-year serious felony enhancement were pleaded, and both were proven. Here, no serious felony enhancement allegation was pleaded or proved. The only allegations pleaded were clearly identified as strike allegations. There was no allegation in the information identifiably giving defendant notice that he could be found subject to a five-year enhancement for a prior serious felony conviction.

The People rely on the proposition that "a valid accusatory pleading need not specify by number the statute under which the accused is being charged." (*People v. Thomas* (1987) 43 Cal.3d 818, 826.) Indeed, even citing the wrong statute is not necessarily fatal to the pleading of an offense or enhancement, as long as it is clear what offense has been factually defined, and that punishment will be sought on that basis. (See, e.g., *People v. Sok* (2010) 181 Cal.App.4th 88, 96, fn. 8.)

Here, however, these general principles are inapplicable, because the pleading here never gave defendant notice that the People would be seeking to impose the five-year enhancements.

In *People v. Tardy* (2003) 112 Cal.App.4th 783 (*Tardy*), the accusatory pleading had charged the defendant with robbery and had alleged prior qualifying convictions (i.e., allegations of prior prison terms served for felony convictions of petty theft with a prior), but it did not specifically charge him with a separate "crime" of petty theft with a prior conviction. The jury acquitted the defendant of robbery, but found him guilty of petty theft. In a bifurcated proceeding on the priors, the prosecutor gave notice that it intended to ask the court to sentence the defendant as a felon under section 666, because some of the defendant's priors qualified as prior theft offenses. After this disclosure, the defendant waived his right to a jury trial, and admitted the prior offenses. The trial court found true a strike offense, and found that the defendant had suffered a prior theft offense conviction. The court proceeded to sentence the defendant for the felony offense of petty theft with a prior. On appeal, the defendant argued that the charging document failed to plead the "crime" of petty theft with a prior. The appellate court rejected this contention, stating first that, "[a]n accusatory pleading stating the charged offense provides the defendant not only with notice of the offense actually charged but also with notice of any necessarily included offenses," and that "[p]etty theft is a necessarily included offense of robbery." (*Id*. at p. 786.) Petty theft with a prior, under section 666, is not a separate crime. Rather, it is in the nature of an elevated sentence or enhancement for multiple

violations of the petty theft statute. (*Id*. at p. 787.) However, "[d]ue process requires that a criminal defendant be given fair notice of the charges to provide an opportunity to prepare a defense and to avoid unfair surprise at trial." (*Id*. at p. 786.) "[C]onstitutional principles of due process [do not] require that the statute be specifically alleged as long as the pleading apprises the defendant of the potential for the enhanced penalty and alleges every fact and circumstance necessary to establish its applicability." (*Id*. at p. 787, citing *People v. Thomas*, *supra*, 43 Cal.3d 818, 826.) Although the pleading here did allege that defendant had suffered prior serious and violent felony convictions, these enhancement or special allegations specifically referenced the doubling or tripling of the basic sentence, pursuant to the second- and third-strike provisions of the three strikes law. Nothing in the pleading gave any hint that the prosecution sought to make defendant subject also to the provisions of section 667, subdivision (a)(1). This is not a case of citing the wrong statute by mistake; the People intended to, and did, specifically invoke the three-strikes sentencing scheme. This is also not a case in which an allegation was pleaded by facts without citation to a specific statutory provision. Again, the prior serious and violent felony allegations specifically referenced the three-strikes sentencing scheme. There was no advisement, anywhere in the pleading, that the People would use the "factual allegations" again, to impose five-year enhancements for each of the strike priors. Although the use of the same conviction twice, once for the purpose of each statutory provision, does not violate any "dual use" principles, the defendant must receive notice in

some fashion that the prosecution intends to subject him or her to such dual use of one conviction.

In *Tardy*, the prosecution advised the defendant of its intent to use the qualifying prior offenses for the purpose of felony sentencing (petty theft with a prior) before the defendant had waived his right to a jury trial on the issue. In contrast, defendant here never received any notification that the People intended to subject him to the added five-year enhancements. Rather, the probation department brought the matter up independently, and did so only after defendant had waived his right to jury trial on the allegations actually pleaded.

In *People v. Mancebo* (2002) 27 Cal.4th 735 (*Mancebo*), the information charged the defendant with sex crimes against more than one victim. It also contained specific allegations of firearm use and kidnapping as the two circumstances required to qualify for an enhancement under section 667.61. At sentencing, the trial court, desiring to use the firearm-use allegation to support other enhancements, purported to find true a multiple-victim circumstance as one of the two qualifying circumstances under section 667.61. Although the information did allege, factually with respect to the substantive offenses, that the defendant had committed sex crimes against multiple victims, there was no allegation that a multiple-victim circumstance would be used to support the section 667.61 enhancement. The California Supreme Court reversed the sentence, holding that the substitution of an uncharged enhancement violated the defendant's due process right to notice that the prosecutor would use facts generally appearing in the rest of the

pleading to fashion an uncharged enhancing allegation. Even though such facts were pleaded with respect to various substantive offenses, "no factual allegation in the information or pleading in the statutory language informed defendant that if he was convicted of the underlying charged offenses, the court would consider his multiple convictions as a basis for One Strike sentencing under section 667.61, subdivision (a). Thus, the pleading was inadequate because it failed to put defendant on notice that the People, for the first time at sentencing, would seek to use the multiple victim circumstance to secure indeterminate One Strike terms under section 667.61, subdivision (a) and use the circumstance of gun use to secure additional enhancements under section 12022.5[, subdivision] (a)." (*Mancebo, supra,* 27 Cal.4th 735, 745, italics omitted.)

The People urge that *Mancebo* should be limited to its peculiar facts, i.e., that the factual matters later used to support an uncharged enhancement allegation were extracted from the allegations relating to substantive offenses, whereas here the factual matters were extracted from other enhancement allegations. "*Mancebo* thus stands for the limited proposition that a defendant is entitled to notice of the specific facts that will be used to support an enhanced sentence. Facts alleged and proved only as part of the substantive crime charged cannot later be used to support a sentencing enhancement. (*Mancebo, supra*, 27 Cal.4th at p. 749.) Tardy's sentence, however, unlike Mancebo's, was enhanced based on facts specifically pleaded and proved as enhancements." (*Tardy, supra,* 112 Cal.App.4th 783, 789.) However, what matters is not the source of the factual matters used to establish an enhancement: it is whether the defendant received notice that

such facts would be used to do so. In *Tardy*, as already noted, the prosecutor gave notice before the trial on the priors that it intended to use one of the alleged prior offenses to establish the "prior theft offense" circumstance which made the defendant eligible for the enhanced felony sentence for petty theft. Here, the prosecutor gave no such notice to defendant that enhancements charged as strikes would *also* be used to impose different and additional sentence enhancements. Neither the language of the allegations, nor the citation to the applicable statute, gave defendant any notice that he would be subjected to any five-year enhancements. The five-year enhancement terms, under both section 667, subdivision (a) and section 667.6, subdivision (a), must be stricken.

3.

ADDITIONAL ISSUES NEED NOT BE REACHED

Defendant raised additional contentions on appeal, having to do with the treatment of the five-year enhancements, should they have been allowed to stand. First, defendant contends that the trial court erred in using a single prior rape conviction to impose two five-year terms, pursuant to both section 667, subdivision (a), and section 667.6, subdivision (a). Second, defendant argues that a five-year enhancement under section 667.6 for sex offenses cannot apply to defendant's current conviction for aggravated sexual assault (§ 269). (See *People v. Figueroa* (2008) 162 Cal.App.4th 95 [Fourth Dist., Div. Two].) Third, because all the strike priors had been brought and tried together, rather than brought and tried separately, the court could impose only one five-year enhancement under section 667, subdivision (a). We have determined that all of the

uncharged five-year enhancement terms must be stricken, and therefore do not address the substance of these remaining contentions.

DISPOSITION

The trial court did not abuse its discretion in declining to dismiss defendant's strike priors pursuant to *People v. Superior Court (Romero), supra*, 13 Cal.4th 497. Defendant was properly sentenced as a third striker, with a trebled term of 45 years to life on the principal offense. However, the court did err in imposing an additional 45 years, for 9 five-year enhancements (eight under § 667, subd. (a), and one under § 667.6, subd. (a)), which were never pleaded sufficiently to apprise defendant that the prosecution intended to subject him to those enhancements. The sentence must be modified to strike the 9 five-year enhancement terms. The abstract of judgment must also be amended, striking the enhancements under sections 667, subdivision (a) and 667.6, subdivision (a), and a corrected copy of the abstract of judgment should be forwarded to the Department of Corrections and Rehabilitation. As so modified, the judgment is affirmed.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

MCKINSTER
Acting P.J.

We concur:

KING
J.

MILLER
J.